



**Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Bulloch International, Inc.  
**File:** B-237369  
**Date:** February 5, 1990

John K. Hobbs, for the protester.  
Vasio Gianulias, Esq., Associate Counsel (Acquisition),  
Department of the Navy, for the agency.  
Sabina K. Cooper, Esq. and Christine S. Melody, Esq., Office  
of General Counsel, GAO, participated in the preparation of  
the decision.

### **DIGEST**

1. Where a bidder certifies in a total small business set-aside both that it will furnish only end items manufactured or produced by domestic small business concerns, and, in its Buy American certificate, that it would supply non-domestic end products, its bid is nonresponsive since it is not clear from the bid documents whether the bidder will comply with the set-aside requirement to supply only items manufactured or produced in the United States.
2. Certification concerning a bidder's obligation to furnish products manufactured or produced by a domestic small business is a matter of responsiveness and is not an issue to be referred to the Small Business Administration since it does not concern a bidder's representation that it is a small business.

### **DECISION**

Bulloch International, Inc., protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. N47408-89-B-2509, issued by the Naval Construction Battalion Center, Port Hueneme, California, for refrigerated containers, related testing, data, and spare parts.

We deny the protest.

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The IFB was issued as a total small business set-aside on July 18, 1989. It incorporated by reference the provisions at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7005 (1983 ed.) which implement the Buy American and Trade Agreements Acts.<sup>1/</sup> The Buy American Act, 41 U.S.C. § 10a-10c (1982), and its implementing regulations provide a preference for domestic items in government procurement by requiring the application of a percentage factor to the offer of a foreign end product.

The solicitation further required the bidder to certify that it is a small business concern and that all end items to be furnished would be manufactured or produced by small business concerns in the United States. See Federal Acquisition Regulation (FAR) § 52.219-1. In this regard, the IFB also included the Notice of Small Business Set-Aside clause, which provides that a manufacturer or regular dealer submitting an offer for supplies in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small business concerns inside the United States, its territories and possessions, or Puerto Rico. See FAR § 52.219-6. Moreover, since the provisions of the Walsh-Healey Public Contracts Act were applicable to the procurement, bidders were required to represent whether they were dealers or manufacturers of the supplies offered. See FAR § 52.222-19.

The Navy received three bids. After determining that the low bidder had submitted a materially unbalanced bid, the Navy found Bulloch to be the apparent low bidder. Bulloch certified that it was a small business and that all items to be furnished would be manufactured or produced by small business concerns in the United States. However, in its Buy American Act Certificate, Bulloch indicated that the refrigerated containers would be from Australia. Bulloch also certified that it was a regular dealer, rather than a manufacturer, of the supplies offered.

Because of the apparent conflict between Bulloch's small business and Buy American Act certifications, the Navy concluded that it was impossible to determine from the face of the bid whether all end items to be furnished under the contract would be manufactured or produced by small business concerns within the United States, as required by the

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<sup>1/</sup> The Navy has noted that, rather than DFARS § 252.225-7005, the IFB should have incorporated DFARS § 252.225-7000, which contains virtually identical language, except that references to the Trade Agreements Act, not applicable to this procurement, are deleted.

solicitation. The Navy therefore awarded a contract to the next low bidder, Ferange Industries, Inc., on September 28, 1989, and notified Bulloch that its bid had been rejected on October 4. Bulloch protested to our Office on October 10. The Navy suspended performance under the contract pending resolution of the protest.

A bid on a small business set-aside must establish the legal obligation of the bidder to furnish supplies manufactured or produced by a domestic small business, generally by the appropriate certification in the bid to that effect; otherwise the bid is nonresponsive to a material requirement of the set-aside and must be rejected. See Wire Rope Corp. of America, Inc., B-225672, Mar. 13, 1987, 87-1 CPD ¶ 286. Similarly, the bidder's Buy American Act certification made elsewhere in its bid must not exclude any end products or otherwise indicate that it is offering foreign end products, since, in those circumstances, the government's acceptance of the bid would not result in a contractual obligation to furnish only domestic end products in compliance with the set-aside requirement. Id.

Here, Bulloch certified that it would furnish all end items manufactured or produced by a domestic small business, and that it was offering an end product from Australia. In arguing that these conflicting certifications in fact are consistent, Bulloch states that while it intended to furnish products manufactured in the United States, 55 percent of the cost of the items would consist of components from Australia. As a result, Bulloch states, it indicated in the Buy American Act certification portion of its bid that it would furnish an "FMS/Offset arrangement country end product," listing Australia as its origin. According to Bulloch, the fact that its product will be composed of foreign components is not inconsistent with its certification that the products will be manufactured by a small business in the United States, and is relevant only for purposes of evaluating its bid under the Buy American Act.

The foreign military sales (FMS)/Offset arrangement program in part permits waiver of the price differentials normally applied pursuant to the Buy American Act for products from an FMS/Offset arrangement country such as Australia. See DFARS §§ 225.7310(c)(2), 225.7403(a)(3). In this regard, the Buy American Act portion of the IFB required bidders to indicate if they intended to provide a product from an FMS/Offset arrangement country. Bulloch did so, indicating that line item 0001 of its bid, the refrigerated containers, qualified as FMS/Offset arrangement country products from Australia.

Despite Bulloch's current argument that it in fact intended by its Buy American Act certificate to indicate only that a substantial portion of the components of the item it offered were of Australian origin--and did not intend to cast doubt on the certification elsewhere in the bid that the items would be manufactured in the United States--the definition of "FMS/Offset arrangement country end product" simply does not support Bulloch's position. Specifically, DFARS § 225.101 provides in part as follows:

"'FMS/Offset arrangement country end product means (i) an unmanufactured end product mined or produced in an FMS/Offset arrangement country; or (ii) an end product manufactured in an FMS/Offset arrangement country if the cost of its qualifying country components and its components which are mined, produced, or manufactured in the United States exceeds 50% of the cost of all its components.'" (Emphasis added.)

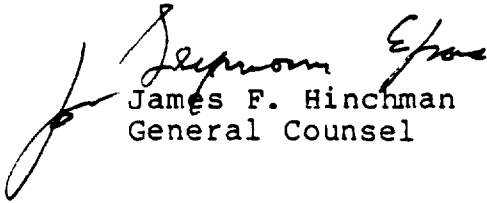
Thus, by stating in its bid that it would be providing an FMS/Offset arrangement country product, Bulloch in effect indicated that the item would be manufactured in Australia. This statement is clearly inconsistent with the certification elsewhere in its bid that the item would be manufactured or produced by small business concerns in the United States.

A bid as submitted must represent an offer to perform, without exception, the exact thing called for in the IFB, so that upon acceptance, the contractor will be bound to perform in accordance with all the terms and conditions of the IFB. Rocco Indus., Inc., B-227636, July 24, 1987, 87-2 CPD ¶ 87. Moreover, only material available at bid opening may be considered in making a responsiveness determination. DuHadaway Tool and Die Shop, Inc., B-216082, Aug. 29, 1984, 84-2 CPD ¶ 239. Accordingly, since Bulloch's bid indicated both that (1) the firm would supply an item manufactured in Australia, and that (2) it would furnish only end items manufactured or produced by small business concerns in the United States, the contracting officer reasonably concluded that Bulloch's bid was nonresponsive in that it was not clear from the bid whether Bulloch would comply with the set-aside requirement to supply a product manufactured or produced in the United States. See Jarke Corp., B-231858, July 25, 1988, 88-2 CPD ¶ 82.

Finally, Bulloch alleges that any question concerning its small business representation should have been referred to the Small Business Administration (SBA) for resolution pursuant to FAR § 19.301(b)(2). This provision requires

that the contracting officer accept an offeror's representation that it is a small business unless there is reason to question that representation. Here, the protester's status as a small business has never been questioned by the contracting officer. What has been questioned is Bulloch's commitment to furnish end items manufactured or produced by small business concerns in the United States. The certification concerning a bidder's obligation to furnish products manufactured or produced by a domestic small business concern is a matter of responsiveness because it involves a performance commitment by the bidder. Jarke Corp., B-231858, supra. Accordingly, where a bid on a total small business set-aside fails to establish the bidder's legal obligation to furnish end items manufactured or produced by a domestic small business, the bid must be rejected by the contracting officer and is not for referral to the SBA. Id.

The protest is denied.

  
James F. Hinchman  
General Counsel